IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1928

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' ANSWERING BRIEFS

WILLIAM T. HART
Schiff, Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-1000

Attorneys for Petitioner Elizabeth B. Stuart, etc.

SAMUEL W. WITWER
J. ALFRED MORAN
SAMUEL W. WITWER, JR.
C. WILLIAM LAKE
Witwer, Moran, Burlage & Atkinson
125 South Wacker Drive
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioner Illinois Institute of Technology

La Salle Street Press — Chicago Printed in U.S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1928

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, a not-for-profit corporation,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' ANSWERING BRIEFS

ARGUMENT

It will be noted that respondent, Continental Illinois National Bank & Trust Company of Chicago, corporate trustee under the Harold L. Stuart Will, has chosen not to answer the petition for writ of certiorari filed by its co-trustee, Elizabeth B. Stuart, and by Illinois Institute of Technology (IIT), petitioners. The answering briefs are those of the re-

spondent charities (hereinafter sometimes referred to as "Intervenors"). While these charitable organizations have no interest in the vested grant to IIT, under the divided opinion in Stuart II they stand to receive all of the grant earnings accumulated during the more than six years of litigation required to establish IIT's entitlement to the vested grant. The briefs of intervenors, DePaul University, et al., and Chicago Historical Society, respectively, are cited (DeP. Br. ____) and (CHS. Br. ____). References to appendices, cited (App. ____ p. __) are to those appended to the petition for writ of certiorari, cited (Pet. p. __).

The petition for writ of certiorari presents a single overriding issue, namely, whether the Illinois Supreme Court, having once determined in Stuart I with finality that "the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint," could subsequently in Stuart II alter that adjudication so as now to allow out of the "relief requested" only the principal amount of the vested grant, denying IIT the accumulated grant earnings, without violating procedural and substantive due process. The answering briefs of intervenors do not respond to this issue, but seemingly seek to evade it by repeated and unsupported assertions that Stuart I awarded the grant earnings to respondent charities.

I. INTERVENORS' CONTENTION THAT THE PETITION WAS NOT TIMELY IS ERRONEOUS AND BEGS THE QUESTION OF WHETHER STUART I ADJUDICATED IIT'S RIGHT TO THE VESTED GRANT EARNINGS.

The brief of intervenors DePaul University, et al., conveniently assumes, from start to finish, that the issue as to the accumulated earnings was decided in intervenors' favor in Stuart I. Begging the question, it argues that the petition for writ of certiorari must be viewed as an effort to

secure Supreme Court review of Stuart I rather than to review and reverse Stuart II. Thus, in their principal and lead argument (DeP. Br. pp. 8, 9), intervenors assert that Stuart I became final November 23, 1977, hence petitioners had ninety (90) days from that date within which to file their petition. Of course, under such a self-serving formulation, intervenors assert that the petition was not filed in a timely manner under 28 U.S.C., § 2101(c).

This formulation is contrary to the facts. Petitioners have not asked this Court to review and reverse Stuart I, nor do they seek to relitigate that initial decision of the Illinois Supreme Court which they contend was expressly stated to be in favor of IIT. They contend that Stuart II deprived IIT of due process in departing from an adjudication in IIT's favor concerning the vested grant earnings which was declared with finality in Stuart I. The ninety (90) day period within which to file the instant petition commenced with the denial of rehearing of Stuart II on March 30, 1979. The instant petition for writ of certiorari was filed within ninety (90) days of that date, properly invoking this Court's jurisdiction under 28 U.S.C. § 1257(3). Accordingly, *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) cited by intervenors, is inapposite.

Lest intervenors DePaul University et al. by their diversionary jurisdictional argument have confused matters, petitioners respectfully restate their contentions;

(a) Stuart I expressly adjudicated IIT's entitlement to the "relief requested" by IIT in Count III of the Second Amended Complaint.

(b) The "relief requested" in that Count expressly included "the increase, gains, income or profits accrued to the vested grant after June 30, 1971".

(c) The original adjudication in Stuart I became final on November 23, 1977, as is admitted by all parties in interest.

(d) The majority, in a divided opinion in Stuart II, departed from that earlier and final adjudication now limiting the relief sought by IIT in Count III to the principal amount of the grant, excluding the pleaded relief as to the accumulated grant earnings, in violation of the rules of *res judicata* and law of the case.

(e) In consequence, IIT has been deprived of procedural and substantive due process by the erroneous decision of the majority of the Illinois Supreme Court in Stuart II, the cause to which the petition for writ of certiorari is directed.

II. INTERVENORS' BRIEFS INCORRECTLY DESCRIBE THE DISPOSITION OF COUNT III IN STUART I.

In an inaccurate paraphrase of the Stuart I opinion, the brief of intervenors DePaul University, et al., could wrongly leave the impression that the Illinois Supreme Court, in the original opinion, directed that IIT should receive only the principal sum of $3.5 million claimed under Count III, while denying the related Count III claim to accumulated earnings on the vested grant. Thus, intervenors assert (DeP. Br., p. 6); "The trial court also decided Count III adversely to IIT, and that judgment was affirmed by the Appellate Court. However, the Illinois Supreme Court held that $3.5 million should be paid to IIT. No further amount was to be paid to IIT . . . ". The misleading paraphrase continues: "Thus, the Supreme Court said, in effect: pay $3.5 million to IIT, and pay the balance of the Stuart estate to the charities, as selected under the trial court's plan of distribution."

It requires only a reading of the opinion in Stuart I to show that these representations are manifestly inaccurate.

(App. A, pp. A-3 to A-6). In no way did the Illinois Supreme Court's original opinion exclude IIT from receiving the accumulated grant earnings nor hold "in effect" that $3.5 million only and "no further amount" was to be allowed IIT. Thus, again, as in the instance of their erroneous jurisdictional argument, intervenors resort to the practice of begging the question, deftly ignoring the express adjudications and findings in Stuart I which show that the Illinois Supreme Court there found the Count III issues in favor of IIT, *without limitation.* (Pet. pp. 13-15)

Intervenors' tactic is, perhaps, best illustrated in footnote 4 of their brief (DeP. Br., p. 13), where the adjudication argument is dealt with summarily in the same self-serving manner, thus: "In Stuart I, the earnings claim was decided against IIT. Under the doctrine of *res judicata*, IIT should not be permitted to relitigate the claim." (DeP. Br., p. 13) This practice is evident throughout the brief being repeated on the last page with the self-serving assertion: "IIT has had more than ample opportunities to present its earnings claim. Whenever the claim has been presented, it has been rejected." (DeP. Br., p. 14) In fairness to this Court, instead of such constant reiteration of their unsupported claim, intervenors should have explained, if they could, why the opening and unqualified holding of the Illinois Supreme Court in the Stuart I treatment of Count III, does not mean precisely what it says: "We determine that the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint." (App. A, p. A-3)

Similarly, the brief of intervenor, Chicago Historical Society, fails to mention that flat-out determination of IIT's entitlement to the relief it sought. Referring only to another finding of the Illinois Supreme Court later in the opinion that "the Circuit Court errred in failing to find for IIT as

to Count III", that intervenor weakly argues that the words, "*as to* Count III" could not allow, in addition to the $3.5 million principal grant, the "increased gains, income or profits thereof" which were claimed in the pleading and prayer of Count III. Intervenor offers no explanation of why part of the relief explicitly pleaded concerning "principal" is to be upheld while the pleading as to the vested "grant earnings" was to be ignored. Nor does the majority of the Illinois Supreme Court explain the reason for the belated excision of a part of the original adjudication when they took up Stuart II.

Similarly, intervenors would have it appear to this Court, contrary to fact, that petitioners are now seeking new interpretations of the Stuart will. Petitioners simply ask adherence to the *prior findings and determinations* of the Illinois Supreme Court concerning the effect of the "vesting" under Stuart's will (App. D, p. D-7). Clearly pleaded in paragraph 17 of Count III, IIT based its entitlement to the accumulated grant earnings after June 30, 1971 on a construction of the will that "vesting" thereunder means vesting in *present enjoyment* with entitlement in a trustee designated grantee of earnings accumulating after that date. Petitioners seek no new construction of Stuart's will; they only ask that the Illinois Supreme Court adhere to the Stuart will interpretation which it necessarily adopted in Stuart I long before it chose a new *ratio decidendi* in Stuart II.

Intervenors response in the context of this prior interpretation of "vesting" is the vague assertion that "vested" has a somewhat different meaning in property law than in constitutional law (CHS. Br., p. 2). However, the final adjudication by the Illinois Supreme Court in Stuart I concerning the Count III theory of "vesting" must be given the same meaning in all contexts if deprivation of property

without due process of law, "in constitutional law", is not to occur.

Intervenors' statement, that the issue of IIT's right to accumulated grant earnings was not raised by IIT in the court below in Stuart I, is irresponsible, and, at best, a half-truth. While grant earnings, *per se*, separate and aside from Count III relief, generally, did not come up in the oral argument (as did not many similarly 'included' matters embraced in broad questions discussed in the limited time allowed for oral argument), it is incorrect to assert that the issue of IIT's entitlement to "the increases, gains, earnings or profits" was not presented to the Illinois Supreme Court in Stuart I. As stated above, paragraph 17 of Count III, pleaded to the effect that "vested" under Stuart's Will meant immediate enjoyment and possession after June 30, 1971 (App. D. p. D-8). Proof that the Count III "vesting" contention was presented in IIT's opening brief to the Illinois Supreme Court in Stuart I is also disclosed by the answering briefs of Loyola University (p. 44), and DePaul University, et al., (pp. 3-4, in Dockets 49070 and 49074) and their responding argument captioned, "IIT's Vested Rights Argument Is Unsupportable". In short, the earnings issue was continuously before the Illinois courts throughout Stuart I.

In Stuart I, the determination that "the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint", is but one of several instances whereby the Illinois Supreme Court expressly referred to the specific pleading described as Count III. Intervenors contend that the highest court of Illinois did not understand what it was writing in Stuart I concerning the allegation and prayers for "relief" in the key pleading described as Count III. Intervenors weakly argue, "It is unthinkable that a reviewing court should be deemed

to have examined and decided material presented only through the Abstract of Record . . .". (DeP. Br. pp. 12-13). Actually, in light of that court's frequent references in Stuart I to Count III, it is only logical to assume that the Illinois Supreme Court well understood the dimensions and prayers of Count III when it decided Stuart I and was not carelessly unmindful of what that pleading contained.

Acceptance of intervenors' tenuous theory of side-stepping the Stuart I adjudication, if given credence, would make a shambles of the doctrines of *res judicata* and law of the case. Under such an approach questioning a decision after the fact, adjudications of courts would never have finality. The test of such finality would not be what a court actually wrote in its opinion or judgment order. Instead, there would be an ongoing inquiry at the insistence of a losing litigant into the question of whether the adjudicating court properly understood the record, whether it had read the pleadings, and whether the specific point at issue was brought up and adequately presented in oral argument. The mere statement of such unprecedented conditions qualifying the application of the rules of *res judicata* and law of the case, demonstrates the fallacy of the argument. Actually, intervenors' suggestion that the Illinois Supreme Court failed to study Count III, on its face is an admission of the original and final adjudication in Stuart II which intervenors struggle to escape.

Intervenors' argument that the federal constitutional issue herein was not raised in a timely manner by petitioners is equally unsound. The Petition, pp. 9-10, discloses the instances and the manner in which petitioners raised the serious and inescapable Fourteenth Amendment considerations of due process. Deprivation of due process was first threatened, and first occurred, in the remand proceedings in Stuart II (not as intervenors imply over the preceding six

years of litigation required to establish IIT's right to the Count III relief), when intervenors revealed their effort to deprive IIT of the accumulated grant earnings; also when the trial court on remand indicated the possible entry of an order having the unconstitutional effect. Clearly, petitioners then promptly asserted and thereafter preserved the substantial constitutional issue at all relevant times. (See Pet. pp. 9, 10)

III. INTERVENORS' BRIEFS ARE UNRESPONSIVE CONCERNING THE APPLICABILITY OF THE RULES OF *RES JUDICATA* AND LAW OF THE CASE, AND THE RELATION OF THOSE RULES TO THE DUE PROCESS ISSUE.

Perhaps, the most revealing aspect of the weakness of intervenors' position before this Court is their failure to respond to petitioners' arguments and cited authorities invoking the doctrines of *res judicata* and law of the case; also in failing to respond to petitioners' contention that the Illinois Supreme Court deprived IIT of both procedural and substantive due process in departing substantially from its earlier and final adjudication in favor of IIT. The general evasionary response of intervenors here again is to present irrelevant arguments, such as, "Petitioners' Tactics In The Courts Below Should Bar Them From Any Further Review" (DeP. Br., 12); and "IIT had an appropriate form of recourse: a Petition for Rehearing, filed within the requisite time period following the entry of the Stuart I Opinion", (again assuming the question at issue in intervenors' own favor); and intervenors unmasked bid for a decision based upon an appeal for more charitable trust funds from Stuart's trust, a tactic pursued in the Illinois Supreme Court when Stuart II was considered, i.e., ". . . IIT had emerged with $8.5 million in distributions from the estate, a figure more than six times the amount received by any other charity. . . ." (DeP. Br., 13)

Intervenors simply provide no meaningful discussion of the legal arguments presented by petitioners regarding the effect of the Stuart I adjudications and the violation of due process which occurred in Stuart II.

Through the remand proceedings in Stuart II, intervenors' principal reliance, in seeking to deprive IIT of the accumulated earnings from its vested grant, was on the single sentence in Stuart I, opinion reading:

> "We hold, therefore, that upon remand, an order be entered directing an additional $3.5 million of the estate to be distributed to IIT." (App. A, p. A-6)

They would read that sentence as the sum total of the opinion. Obviously, that sentence was intended by the Illinois Supreme Court to be read consistently with its prior explicit determinations and findings in the four preceding pages of the opinion upholding IIT's right to the relief sought in Count III. (App. A, pp. A-3 to A-6)

As pointed out in Mr. Justice Underwood's dissent in Stuart II, the majority made clear in their opinion that the Court did not "exclude an increase to the IIT grant in the earlier opinion". (App. C, p. C-6) Certainly, the above quoted sentence to the effect that a $3.5 million grant would be allowed "upon remand" did not exclude nor did it negate other Count III relief, including the vested grant earnings to the extent such relief was allowed and determined earlier in the opinion, nor was it necessarily inconsistent therewith. There is obviously no logic in treating the final sentence of the opinion pertaining to Count III as if it alone were the "judgment" or "holding" of the Court, as intervenors would have it read (DeP. Br. p. 10), while rendering meaningless all other Stuart I determinations including the explicit opening adjudication that: "We determine that the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint."

The mandate of the Supreme Court of Illinois, dated December 2, 1977, (App. B) was, in general form, expressly adopting, incorporating by reference and attachment, the full opinion of the court in Stuart I. The "judgment" of Stuart I is found in the following paragraph of the mandate:

> THEREFORE, it is considered by the Court that for that error and others in the records and proceedings aforesaid, the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, in this behalf rendered, BE AFFIRMED IN PART AND REVERSED IN PART *in the respects set out in the opinion of this Court,* and that this cause be remanded to the Circuit Court of Cook County for modifications and further proceedings *consistently with the opinion attached to this mandate.* (Emphasis added) (App. B, p. B-2)

In the context of a mandate in such form adopting the entire opinion, the pertinent Illinois cases show that such a mandate means precisely what it says. The lower court, on remand was required to give effect to the opinion to fulfill the directions of the mandate. *People, ex rel, Olson* v. *Scanlon,* 294 Ill. 64, 128 N.E. 328 (1920); *Merrill* v. *Drazek,* 58 Ill. App. 3d 455, 374 N.E. 2d 792 (1978). In determining what the Illinois Supreme Court adjudicated in Stuart I, it is therefore necessary to give effect to all determinations and findings as to Count III relief, not simply the isolated sentence upon which intervenors rest their case. The cases cited by intervenors' namely, *Adams* v. *Pearson,* 41 Ill. 431, 104 N.E. 2d 267 (1952); *People, ex rel. William J. Scott* v. *Chicago Park District,* 66 Ill. 2d 65, 360 N.E. 2d 773 (1976); *Black* v. *Cutter Laboratories,* 351 U.S. 291 (1956), and *Federal Communications Commission* v. *Pacific Foundation,* 438 U.S. 726 (1978), do not support their position.

IV. THERE ARE SUBSTANTIAL AND IMPORTANT REASONS WARRANTING REVIEW OF STUART II ON WRIT OF CERTIORARI.

The substantiality and broad importance of the question presented by the petition for writ of certiorari cannot be obscured by intervenors' narrow characterization of the case as involving no more than a local will construction problem and as presenting no important principle of law. Actually, this case presents a substantial and highly important federal question bearing on the administration of justice in the State courts of last resort as well as all other judicial tribunals. There is, indeed, a direct operative relation between the doctrines of *res judicata* and law of the case, on the one hand, and the uniformity, certainty and good order of judicial administration, on the other hand, which depicts an important national interest entitled to protection. Long ago, as it is equally true today, this Court observed in *Johnson Company v. Wharton*, 152 U.S. 252, 257 (1893):

> "The peace and order of society demand that matters distinctly put in issue and determined, by a court of competent jurisdiction as to parties and subject matter, shall not be retried between the same parties in any subsequent suit in any court."

When a departure from *res judicata* and law of the case occurs at the level of a State's court of last resort, in a proceeding not otherwise reviewable by this Court, then, certainly, the total interest of the due administration of justice is impaired. In such context, when there is no other possible recourse for relief, a deprivation of due process becomes all the more serious a matter. Thus, the instant case, whether standing alone in its own right as a matter of justice to IIT, a major American technological institution or viewing the case in its representative and illustrative

aspect speaking for the due administration of justice at the highest State court levels, it is substantial and significant. It highlights the fact that the only real sanction for upholding the fundamental doctrines of *res judicata* and law of the case against judicial abuse necessarily lies in review by this Court.

The petition herein is also significant because the due process question, surprisingly, appears to be one of first impression in the annals of this Court. Exhaustive review by counsel for petitioners has disclosed no case in this Court in which the due process sanction has, as yet, been utilized to undergird and enforce adherence by all courts below to the standards of *res judicata* and law of the case. The only federal decision petitioners have found dealing explicitly with the precise question of whether and when violation of *res judicata* and law of the case constitutes a deprivation of federal due process, is *Sotomura* v. *County of Hawaii*, 46 Fed. Supp. 473 (1978) where the court, not surprisingly, held that ". . . where a refusal of a State court to apply *res judicata* in a second proceeding results in a direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the owners' constitutional right to due process." Of course, this Court has defined, in nonconstitutional contexts, the existence and viability of the rules of *res judicata* and law of the case. Cf. *South Pacific Railway Co.* v. *U.S.*, 168 U.S. 149. What is needed is its affirmation of positive sanction for those rules.

The expression in *Sotomura* is a teaching of such importance that it warrants pronouncement by this Honorable Court so as to provide a clear line of consistent and predictable action by all courts, including those functioning at the highest State level of last resort. The issuance of the writ will significantly serve the total administration of justice.

CONCLUSION

For the reasons stated above, petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

WILLIAM T. HART
Schiff, Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Attorneys for Petitioner Elizabeth B. Stuart, etc.

SAMUEL W. WITWER
J. ALFRED MORAN
SAMUEL W. WITWER, JR.
C. WILLIAM LAKE
Witwer, Moran, Burlage & Atkinson
125 South Wacker Drive
Chicago, Illinois 60606

Attorneys for Petitioner Illinois Institute of Technology